BUNGSAR HILL HOLDINGS SDN BHD

v.

DR AMIR FARID DATUK ISAHAK

FEDERAL COURT, PUTRAJAYA
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
ABDUL HAMID MOHAMAD FCJ
[CIVIL APPEAL NO: 03-2-2004 (W)]
22 MARCH 2005

BANKRUPTCY: *Receiving and adjudication orders - Setting aside - Grounds - Interpretation of "where in the opinion of the court a debtor ought not to have been adjudged bankrupt" in s. 105(1) Bankruptcy Act 1967 - Whether interpreted to cover technical grounds only - Debtor's "ability to pay his debt" - Whether a legal ground within s. 105(1) - Debtor's solvency and ability to pay debts - Whether proved*

BANKRUPTCY: *Receiving and adjudication orders - Application to set aside - Debtor did not appear at hearing of creditor's petition - Whether debtor disqualified from making application*

The senior assistant registrar dismissed the respondent's application to set aside receiving and adjudication orders ('RO and AO') made against him based on a creditor's petition ('CP') filed by the appellant in court. On the respondent's appeal to the judge in chambers, the learned judge set aside the RO and AO. The order of the learned judge was confirmed on appeal to the Court of Appeal. In this instance, the appellant was granted leave to appeal on the following issues: (1) whether the words "where in the opinion of the court a debtor ought not to have been adjudged bankrupt" in s. 105(1) of the Bankruptcy Act 1967 ('the Act') covered only technical grounds; (2) whether the debtor's "ability to pay his debt" was a legal ground that fell within the said provision; (3) whether the respondent's non-appearance at the hearing of the CP disqualified him from making the setting aside application; and (4) whether the learned judge was correct on the facts in finding that the respondent was solvent and able to pay his debt.

Held (dismissing the appeal)
Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

[1] The words "where in the opinion of the court a debtor ought not to have been adjudged bankrupt" in s. 105(1) of the Act does not cover only technical defects like defective service of the BN or CP but is wider and covers other "legal grounds" like an abuse of the process of the court. However, it should not be stretched too far to cover extraneous "moral" or "equitable" grounds. It has to be a legal ground as the court is only concerned with the law. In his application, the respondent was able to pay his debt. That might not be strictly a technical ground. However, it was a legal ground that fell within the ambit of the discretion under the said provision. It is also one of the grounds provided by s. 6 of the Act as a factor the court should consider in deciding whether or not to make a receiving order. (pp 819 g, 820 a & 825 a)

[2] The material date for consideration whether the RO and AO ought or ought not to have been made is the date of adjudication. This is because in the first limb of s. 105(1) of the Act the words "ought not to have been adjudged bankrupt" denotes the past tense. On the other hand, in the second limb of the said provision the words "the debts of the bankrupt are paid in full" denotes the present tense. Similarly, in the third limb of the said provision the present tense "are pending" is used. This clearly indicates that the material date for consideration in the case of the first limb is a date in the past that logically should be the date of adjudication. (pp 821 c-d & 822 f)

[3] The learned judge found as a fact that the respondent was solvent and able to pay his debt as at the date the orders were made. His finding of fact was not perverse. It was supported by evidence and there was no valid reason for this court to interfere. Indeed, had the respondent appeared at the hearing of the petition, he might have satisfied the judge that he was able to pay his debt. His fault was that he did not appear on the date of the CP's hearing as he claimed that he did not know about it since service of both the BN and the CP were done by way of substituted service. Although substituted service is as good in law as personal service, the fact remained that he did not know of the date of hearing of the petition. The fact that the respondent did not appear on the date of hearing, however, did not disqualify him from applying to annul the order. Nevertheless, this factor should only be considered on the facts and circumstances of each case. Further, the respondent's ability to pay his debt was specifically provided for in sub-s. (3) of s. 6 of the Act. It fell under the clause "ought not to have been adjudged bankrupt" in s. 105(1) of the Act. (p 824 c-h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Penolong Kanan Pendaftar telah menolak permohonan responden untuk mengenepikan perintah penerimaan dan penghukuman ('RO dan AO') yang dibuat terhadapnya berdasarkan kepada petisyen pemiutang ('CP') yang difailkan oleh perayu di mahkamah. Ekoran rayuan responden kepada hakim dalam kamar, RO dan AO telah diketepikan oleh yang arif hakim. Di rayuan, perintah yang arif hakim ini telah disahkan oleh Mahkamah Rayuan. Perayu bagaimanapun telah diberi kebenaran untuk merayu atas isu-isu berikut: (1) sama ada perkataan-perkataan "di mana mahkamah berpendapat seseorang penghutang tidak sepatutnya dihukum bankrap" di dalam s. 105(1) Akta Kebankrapan 1967 ('Akta') hanya mencakupi alasan-alasan teknikal; (2) sama ada "keupayaan penghutang untuk membayar hutangnya" merupakan suatu alasan undang-undang yang termaktub dalam peruntukan tersebut; (3) sama ada ketidakhadiran perayu pada pendengaran CP telah menghilangkan kelayakannya untuk membuat permohonan pengenepian; dan (4) sama ada yang arif hakim betul pada fakta apabila mendapati bahawa responden adalah solven dan berkeupayaan membayar hutangnya.

Diputuskan (menolak rayuan)

Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah:

[1] Perkataan-perkataan "di mana pada pendapat mahkamah seseorang penghutang tidak sepatutnya dihukum bankrap" dalam s. 105 Akta tidak hanya meliputi kecacatan-kecacatan teknikal seperti kecacatan pada penyerahan Notis Kebankrapan ('BN') atau CP, tetapi adalah lebih luas dari itu dan meliputi juga "alasan undang-undang" lain seperti penyalahgunaan proses mahkamah. Bagaimanapun, ia tidak harus dipanjangkan sebegitu jauh hingga merangkumi alasan-alasan "moral" dan "equitable" yang tidak ada kena mengena. Ia mestilah suatu alasan undang-undang kerana mahkamah hanya berurusan dengan undang-undang. Dalam permohonan semasa, responden berupaya untuk membayar hutangnya. Ini secara ketatnya mungkin bukan satu alasan teknikal. Namun, ia adalah satu alasan undang-undang yang terangkum ke dalam ruang budibicara di bawah peruntukan itu. Ia juga adalah salah satu alasan yang diperuntuk oleh s. 6 Akta sebagai faktor yang perlu dipertimbang oleh mahkamah dalam memutuskan sama ada untuk membuat atau tidak membuat perintah penerimaan.

[2] Tarikh material untuk pertimbangan sama ada RO atau AO patut diberikan adalah pada tarikh penghukuman. Ini kerana dalam cabang pertama s. 105 Akta perkataan "ought not to have been adjudged bankrupt" mencerminkan katakerja kalalampau. Sebaliknya, dalam cabang kedua peruntukan tersebut, perkataan "the debts of the bankrupt are paid in full" menunjukkan katakerja kalasekarang. Begitu juga, dalam cabang ketiga peruntukan, katakerja kalasekarang "are pending" telah digunakan. Ini menunjukkan bahawa tarikh material untuk pertimbangan dalam kes cabang pertama adalah suatu tarikh lampau yang secara lojiknya adalah tarikh penghukuman.

[3] Yang arif hakim mendapati sebagai suatu fakta bahawa responden adalah solven dan berupaya membayar hutangnya setakat tarikh perintah-perintah dibuat. Dapatan faktanya itu bukanlah 'perverse'. Ia disokong oleh keterangan dan tidak terdapat alasan munasabah bagi mahkamah ini untuk campur tangan. Malah, sekiranya responden hadir di pendengaran petisyen, beliau berkemungkinan akan memuaskan yang arif hakim bahawa beliau mampu untuk membayar hutang. Kesalahannya adalah kerana beliau tidak hadir pada tarikh pendengaran CP disebabkan, seperti yang beliau dakwa, beliau tidak tahu mengenainya kerana penyerahan kedua-dua BN dan CP dibuat melalui penyerahan ganti. Walaupun penyerahan ganti adalah sama sahnya di sisi undang-undang seperti penyerahan kediri, hakikatnya masih lagi bahawa beliau tidak mengetahui tentang tarikh pendengaran petisyen. Fakta bahawa responden tidak hadir pada tarikh pendengaran, bagaimanapun, tidak menghilangkan kelayakannya untuk memohon membatalkan perintah tersebut. Apapun, faktor ini harus dipertimbang menurut fakta dan keadaan sesuatu kes. Selain itu, soal keupayaan responden untuk membayar hutang telah diperuntuk secara khusus di dalam seksyen kecil (3) s. 6 Akta. Ia terangkum ke dalam ungkapan "tidak sepatutnya dihukum bankrap" di dalam s. 105(1) Akta.*]*

Case(s) referred to:

In re Hester ex p Hester [1889] Vol xxii QBD 632 ***(refd)***
Re Dunn (a Bankrupt), ex p Official Receiver v. Dunn [1949] 2 All ER 388 ***(refd)***
Re Mat Shah Safuan, ex p United Asian Bank Bhd [1991] 2 MLJ 48 ***(refd)***
Re Nyana Pandithan, ex p Muniamah Narayanam & Ors [1994] 2 CLJ 448 HC ***(refd)***
Re Yap E Boon [1933] Vol 11 SSLR 217 ***(refd)***
Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta Malaysia [1995] 2 CLJ 368 SC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 6(3), 8(1), 49(1), (2), 103, 105(1)
Subordinate Courts Rules 1980, O. 26A r. 1

Other source(s) referred to:
Halsbury's Laws of England, 4th edn reissue, vol 3(2), pp 326-327

For the appellant - Anantham Kasinather (Kamil Azman Abdul Razak with him); M/s Skrine
For the respondent - Norhafsah Hamid; M/s Adam & Co

[Appeal from Court of Appeal, Civil Appeal No: W-03-72-1996]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Mohamad FCJ:
The respondent debtor, had been a partner with two other doctors in a partnership called "Poliklinik Kotaraya". The respondent had a 35% share in the partnership. In 1989, a dispute arose between the partners leading to the filing of several civil suits in court.

On 13 March 1990, the High Court appointed two interim receivers and managers to manage the partnership pending final settlement of the dispute. The receivers were, *inter alia*, authorized by the court to pay each of the partners a monthly allowance of RM4,000.

On 30 November 1990, the appellant obtained summary judgment pursuant to O. 26A r. 1 of the Subordinate Courts Rules 1980 against the respondent for the sum of RM 32,095.41 together with interest thereon at the rate of 8% per annum from 1 November 1988 to the date of full payment and RM2,033.50 costs.

On 12 May 1993, a bankruptcy notice was issued.

On 10 November 1993, the partners entered into a settlement agreement which, *inter alia*, provides for the appointment of interim receivers and managers "to receive and manage the affairs of the Practice pending the disposal of the Civil Suits …" and for the sale of the partnership.

On 31 January 1994, the bankruptcy notice was served on the respondent by way of substituted service which was not disputed.

On 29 July 1994, a creditor's petition was filed. It was also served by way of substituted service on 11 May 1995. The creditors petition was heard by the senior assistant registrar on 27 June 1995. The respondent did not appear nor contest the petition. Receiving and Adjudication Orders ("R.O. & A.O.") were made.

On 10 January 1996, by a summons-in-chambers, the respondent applied to set aside and annul the R.O and A.O. on the sole ground that arising from the dissolution of the partnership, monies would become due and payable to him upon the completion of the liquidation of the affairs of the partnership by the liquidator. (More will be said about this later). The application was made pursuant to s. 105 of the Bankruptcy Act 1967 ("the Act").

On 10 June 1996, the senior assistant registrar dismissed the application. On appeal to the judge-in-chambers, on 7 September 1996, the learned judge set aside the R.O. and A.O. The order of the learned judge was confirmed by the Court of Appeal on 20 March 2003.

On 21 June 2004, this court granted leave to the appellant to appeal on the following questions:

(1) whether the words "where the court is ... satisfied by the debtor that he is able to pay his debts or that for other sufficient cause no order ought to be made, the court may dismiss the petition …" in Section 6 (3) of the Bankruptcy Act 1967, would apply to a situation where the debtor, although being properly served, never appeared before the court at the hearing of the Creditor's petition and therefore could not have satisfied the court that he was able to pay his debts at the relevant date?

(2) whether the words "ought not to have been adjudged a bankrupt" in Section 105 of the Bankruptcy Act 1967 is only applicable to cases of procedural or substantive defect in the making of the Adjudication Order and Receiving Order ("AO" and "RO")?

(3) whether in law the court can annul and rescind the AO and RO pursuant to Section 105 of the Bankruptcy Act 1967 when the debtor has not paid as at the date of the application and has not alleged that his only source of payment of his debts is an asset which would be put to an end by his bankruptcy?

(4) whether a bankrupt's solvency is a material consideration in an application for annulment pursuant to Section 105 of the Bankruptcy Act, and if so, the point of time at which the debtor should have been able to settle his debts?

(5) whether the words of Section 105 (1) of the Bankruptcy Act 1967, "whether in the opinion of the court a debtor ought not to have been adjudged bankrupt …" apply to the sole ground advanced by the Respondent that he had monies tied up somewhere but could not satisfy the judgment debt when the Adjudication and Receiving Orders were made without paying the judgment debt that remains outstanding?

(6) whether the Court of Appeal can take notice of developments since the making of the order by the High Court Judge, which demonstrate that the Applicant misled the High Court into exercising his discretion in his favour?

A number of arguments was raised before us. I propose to deal with them point by point.

Scope Of The Discretion Under s. 105(1)

Section 105(1) of the Act provides:

> **105 Power of court to annul adjudication in certain cases**
>
> (1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, the court may annul the adjudication.

That the jurisdiction of the court to annul a bankruptcy order under s. 105(1) is discretionary is without doubt. All authorities referred to say the same thing. However, the question is the scope of the discretion.

Learned counsel of the appellant argued that the sub-section was only applicable to cases of procedural and substantive defect in the making of the R.O and A.O. Secondly, he argued that the relevant date at which the debtor should have been able to settle his debts ought to be the date of the hearing of the creditor's petition. Other points regarding the exercise of the discretion under that sub-section will be discussed later.

On the first point, ie, whether s. 105(1) only applies to cases of procedural and substantive defects, the learned judge, following *In re Hester: ex parte Hester* [1889] Vol. xxii QBD 632, held that the scope of s. 105(1) is much wider. For convenience, I shall reproduce the passages quoted by the learned judge from the judgments of Cave J and Charles J at pp. 633 and 636 of the report.

Per Cave J.

> The language of s. 35 is somewhat vague, and I think it was intentionally left vague, in order that the Court may be able to do full and complete justice. I do not think it was intended that the application should be made on purely technical grounds, which might or might not have been successful at the time when the order was made, but that the words were meant to apply to larger

> objections – more equitable objections – such, for instance, as that the matter cannot be successfully worked out in bankruptcy, that the objects of the law of bankruptcy cannot be sufficiently attained by an adjudication, and that there are reasons why, in the interest of all the creditors, and without detriment to the public, the adjudication may be annulled. I think the section gives the Court a very wide discretion.

Per Charles J.

> These words undoubtedly are very wide, and many grounds can be conceived upon which the Court might come to the conclusion that a debtor ought not to have been adjudged bankrupt.

The learned judge in the instant appeal then said:

> After hearing submissions, I came to the conclusion, in line with the statements from In re Hester that I have quoted, that the discretion of the court under subsection (1) of section 105 to annul an adjudication on the grounds that the debtor ought not to have been adjudged bankrupt is very wide, that the exercise of the discretion is not confined only to cases involving purely technical grounds but that the discretion is meant to be exercised on the broader and weightier grounds of justice and equity. The words "ought not have been adjudged bankrupt" suggest that the court may look back to review the situation and consider, in all the circumstances, whether the debtor deserved to have been adjudged bankrupt. The adjudication may have been faultless procedurally but the court may annul it if it is not fair or equitable that the debtor should have been adjudged bankrupt.

The Court of Appeal too cited the same passage from the judgment of Cave J cited by the learned J and reproduced above. Even though the Court of Appeal did not say so in so many words, undoubtedly it agreed with the learned judge.

Let us look at that sub-section closely. There are three instances when the court may annul the adjudication. First, when in the opinion of the court a debtor ought not to have been adjudged bankrupt. Secondly, where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full. Thirdly, where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country.

Obviously, it is only the first limb that is relevant in this case.

I shall now look at the case law. First, I shall look at *In re Hester: Ex parte Hester (supra)*. In that case, the debtor did not appeal against the receiving order, but later applied to rescind it on the ground that all his creditors consented to the rescission. The Registrar of the County Court who heard the application refused to rescind the receiving order.

On appeal to the Divisional Court, the Divisional Court, consisting of Cave J and Charles J dismissed the appeal. The appeal to the Court of Appeal was also dismissed. In other words, the application to rescind the receiving order was dismissed. I think the principles laid down by the case is as stated in the headnote:

> The Court has jurisdiction to rescind a receiving order, even though no scheme of arrangement or composition has been proposed by the debtor under the provisions of s. 18 of the Bankruptcy Act, 1883. But the exercise of the jurisdiction is a matter of discretion, and the order will not be rescinded as a matter of course because all the creditors consent to the rescission. The Court will consider all the circumstances of the case, the interests of the general body of creditors, and the interests of the public, and will be guided by the provisions of s. 35 as to the annulment of an adjudication of bankruptcy.

It is to be noted that the headnote in [1889] Vol xxii QBD 632 which reports both the judgments of the Divisional Court and the Court of Appeal and the headnote found in [1886-1890] All ER (Reprint) 865 which only reports the Court of Appeal judgment are exactly the same. Besides what Cave J (Divisional Court) had said which has been quoted above, Charles J who sat with Cave J had this to say:

> In the present case the debts of the person against whom this receiving order was made have not been paid in full. Is it a case in which, if he had been adjudged a bankrupt, the Court would say that he ought not to have so adjudged? These words undoubtedly are very wide, and many grounds can be conceived upon which the Court might come to the conclusion that a debtor ought not to have been adjudged bankrupt. For example, if there was no sufficient petitioning creditor's debt, or no act of bankruptcy, or if it turned out that the adjudication had been obtained for some sinister purpose, that is, some purpose foreign to the administration of bankruptcy law; all these are grounds on which the Court might be of opinion that the debtor ought not to have been adjudged bankrupt. But it is argued that the mere fact of the consent of all the creditors having been obtained to the rescission is sufficient. *Ex parte Leslie* (2) decides that it is not; and the same principle was acted on in *In re Gyll* (3), and by the Court of Appeal in *In re Dixon and Cardus*. (4)

It is to be noted that the examples given by Charles J cover both technical and non-technical grounds. An example of a non-technical ground given by the learned judge is, "if it turned out that the adjudication had been obtained for some sinister purpose, that is, some purpose foreign to the administration of bankruptcy law".

All the three judges in the Court of Appeal in that case made no mention whether the provision covers only technical defects. However, the fact that they considered that consent by the creditors is by itself sufficient for the court to annul the receiving order (in that case), shows that they did not read the provision as confining only to technical defects at the time of making the order.

The judgment of the Supreme Court in *Sama Credit & Leasing Sdn. Bhd. v. Pegawai Pemegang Harta Malaysia* [1995] 2 CLJ 368,was cited to us. In that case, the official assignee applied to set aside the R.O and A.O. on the ground that the debtor had already been declared a bankrupt by another petition.

The senior assistant registrar refused the application. The learned judge of the High Court reversed the senior assistant registrar's decision and set aside the R.O. and A.O. The Supreme Court allowed the appeal to the effect that the application for the annulment of the second R.O. and A.O. was refused. Chong Siew Fai FCJ (as he then was), who delivered the judgment of the court, specifically said that the first limb of s. 105(1) was the relevant one in that case. However, no mention was made in the judgment whether the provision covers technical defects only or otherwise.

All that the court said was this:

> The powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion are, broadly speaking, the same. See *In re a Debtor (No. 446 of 1918)* [1920] 1 KB 461 @ 465 applied in *Re a Debtor (No. 12 of 1970) ex p. the Official Receiver v. The Debtor* [1971] 1 ER 504. All the relevant facts and circumstances must be considered.

The judgment seems to turn on the provisions of s. 8(1) and s. 49(1), (2). The court held that s. 8(1) did not prohibit the making of a second or subsequent R.O. and A.O. However, in my view, looking at the ground ie, whether a second R.O. and A.O. could be made, it appears to be technical in nature. In my view this case is not of much assistance to us on this point.

In *Re: Yap E. Boon* [1933] Vol 11 SSLR 217, R.O. and A.O. were made against the debtor. An application was made, not by the debtor, but by United Engineers which, subsequent to the making of the R.O. and A.O. was ordered to pay a certain amount of money to the official assignee under the then s. 103 (similar to the present s. 105(1)) to annul the R.O. and A.O on the ground that the debt to the petitioning creditor was not in existence on the date the act of bankruptcy was alleged to have been committed. The Court of Appeal, held:

> When Receiving and Adjudication Orders have been made against a debtor at the instance of a creditor whose debt was not in existence at the date of the act of bankruptcy relied on, no receiving and adjudication orders will be made; and if such orders have been made they will be annulled; as the Court has no to refuse to act consider such orders if wrongly made.

The R.O. and A.O. were set aside. In his judgment, Terrell J said this:

> "In cases, however, falling under the first part of the section" (now first limb of section 105 (1) – added) "it is to be assumed that the order of adjudication was not properly made. There must have been some defect and the debtor "ought not to have been adjudged bankrupt."

On the issue under discussion, the authors of the *Halsbury's Laws of England*, 4th edn Reissue, vol. 3(2) has this to say:

> 599. Orders which ought not to have been made. A bankruptcy order made in proceedings which are an abuse of the process of the court, or foreign to the purposes of bankruptcy law, may be annulled, as may also an order made under a defective petition which has not been amended before the making of the bankruptcy order, or upon evidence relating to the debtor which turned out to be untrue, or where the debtor was dead at the time when bankruptcy proceedings were taken against him, or where the debtor was a minor and the debt was not enforceable against the debtor. The grounds on which the order ought not to have been made must have been existing at the time the bankruptcy order was made.

From the cases referred to above, it appears that only Terrel J in *Re: Yap E Boon (supra)* talked about "There must have been some defect …" which seems to suggest technical defects. But, it must be remembered that the ground for the application for annulment in that case, ie, that the debt was not in existence on the date the act of bankruptcy was alleged to have been committed, was itself a "technical defect" if proved to be true.

On the other hand, even if we put aside the general observations of Cave J and Charles J in *In re Hester: ex-parte Hester (supra)* and look at the examples given by them and also in *Re:Yap E Boon (supra)* and by the learned authors of *Halsbury's Laws of England (supra)*, it appears that the scope of discretion under s. 105(1) is not only limited to technical defects, eg, defective service of the bankruptcy notice and/or the creditor's petition or that there was no debt due or that no act of bankruptcy was committed. Opinion is unanimous that abuse of process of the court is a ground for annulling the R.O. & A.O under the first limb of s. 105(1). I think, abuse of process of the court may or may not be a "technical defect". So, I am of the view that that the provision should not be read to cover only technical defects, but it is wider and includes other "legal grounds" like abuse of the process of the court (this is only an example). However, I do not think that it should be stretched too far to cover extraneous "moral" or "equitable" grounds. It has to be a legal ground as the court is only concerned with the law.

Coming back to the ground in this application ie, the respondent was able to pay his debt. This may not be strictly a technical ground. But, in my view, it is a "legal ground" that falls under the ambit of the discretion under the provision. Indeed, it is one of the grounds provided by s. 6 as a factor that the court should consider in deciding whether or not to make a receiving order.

In conclusion, it is my view that the ground forwarded in this case does fall within the ambit of the first limb of s. 105(1).

The Relevant Date For Consideration

Learned counsel for the appellant argued that the material date to consider whether the respondent was able to pay the debt or not ought to be the date of the hearing of the creditor's petition. Lest it may be confused with the second limb, it should be noted that this argument was made under the first limb, ie, whether the R.O. and A.O ought to have been made because, as alleged by the respondent, he was able to pay the debt. This issue becomes relevant as we have held that the first limb covers a much wider scope than technical grounds only. The second limb, on the other hand, talks about "where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full." The second limb is not applicable in this case as the debt has not been paid in full, until now.

From the judgment of the learned judge, it appears quite clearly that the material date considered by him was the date of adjudication, which in this case is also the date of hearing of the creditor's petition ie, 27 June 1995. The following are extracts from his judgment:

> **On the date of adjudication,** 27 June 1995, the debtor had an interest in the partnership business which was more than sufficient to pay off his debt to the petitioning creditors … – page 52 of the appeal records. (emphasis added).

At p. 55 of the appeal records, the learned judge again said:

> On that premise, I came to the conclusion that the debtor ought not to have been adjudged bankrupt because, **at the time he was adjudged bankrupt,** he was a person who was able to pay his debts, which is a ground under subsection (3) of section 6 for refusing a petition ... (emphasis added)

And again, on the same page:

> On the facts that I have summarized, I was of opinion that the debtor was, **at the time of the adjudication,** able to pay his debts. (emphasis added)

Again, at p. 58 of the Appeal Records:

> I was of the view that the debtor ought not to have been adjudged bankrupt because, **on the facts existing at the date of the adjudication,** there was sufficient cause why no order ought to be made, which is another ground in subsection (3) of section 6 for dismissing a petition. The debtor **was** solvent. (emphasis added)

In the circumstances, this argument ought not to have been forwarded because that was what the learned judge did: he considered the respondent's ability to pay his debt or solvency or insolvency as at the date of adjudication which was also the date of the hearing of the creditor's petition.

That, in my view, is the correct date for consideration. First, it should be noted that in the first limb of s. 105(1) the words "ought not to have been adjudged bankrupt" are used. It denotes past tense. On the other hand, in the second limb, the words "the debts of the bankrupt are paid in full" which denotes the present tense, are used. Similarly, in the third limb, the present tense "are pending" is used. This clearly indicates that the material date for consideration, in the case of the first limb, is a date in the past which, logically is the date of adjudication.

Courts in Malaysia have held the same view. This is clear from the judgment of Terrell J in *Re: Yap E Book (supra)*:

> It will be seen that the section is divided into two parts. The Court may annul the adjudication either
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> (a) when the debtor ought not to have been adjudged bankrupt. This clearly refers to circumstances in existence **at the date of the bankruptcy petition,** as for instance, that the debtor was not carrying on business in the jurisdiction, or that he had never been served, or that the petitioning creditor had no provable debt, etc – or
>
> (b) that the debts have been paid in full. This equally clearly refers to something that has happened **after** the date of the adjudication order. In the latter case there is no dispute that the adjudication order was properly made in the first case but owing to subsequent payment in full of his debts the bankrupt is entitled to apply for annulment in lieu of discharge, and be put in the same position as if he had never been adjudged. (emphasis added)

The Supreme Court in *Sama Credit & Leasing Sdn. Bhd. (supra)* said:

> One of the ways a bankruptcy may be disposed of is by annulment. Section 105(1) of the Act provides, *inter alia*, two situations under which annulment may be granted:

(1) when in the opinion of the Court the debtor ought not to have been adjudged bankrupt; or

(2) where the debts are paid in full.

The first situation is relevant in our case. And, in considering whether a receiving order ought to have been made the appellate Court would consider the actual state of affairs **at the date of the order** and would, generally speaking, not take into account matters that had occurred after that date. (emphasis added).

For that proposition the court relied on the judgment of Sir Raymond Evershed MR in *Re Dunn (a Bankrupt), Ex. p. Official Receiver v. Dunn* [1949] 2 All ER 388 (CA).

The position is made very clear by the authors of *Halsbury's Laws of England,* 4th edn Reissue, vol. 3(2) at p. 326-327:

598 Grounds for annulment. The court may annul a bankruptcy order if it at anytime appears to the court:

(1) that, on the grounds existing at the time the order was made, the order ought not to have been made; or "…

And in para. 599:

… The grounds on which the order ought not to have been made must have been existing at the time the bankruptcy order was made.

I agree that the material date for consideration whether R.O. and A.O. ought or ought not to have been made is the date of adjudication.

Something needs to be said about *Re Mat Shah bin Safuan, ex p. United Asian Bank Bhd* [1991] 2 MLJ 48 and *Re: Nyana Pandithan: Ex Parte Muniamah d/o Narayanam & 6 Ors.* [1994] 2 CLJ 448, both judgments of the High Court.

In *Re Mat Shah bin Safuan (supra),* the debtor applied to set aside the bankruptcy notice and the creditor's petition on three grounds one of which was that the debtor was able to pay his debt and therefore the petition should be dismissed. On this issue, the learned judge, *inter alia,* said:

The ability to settle any judgment debt in full under section 6(3) of the Bankruptcy Act 1967 must be established before the act of bankruptcy is committed, ie, before the expiry of the seven days after service of the bankruptcy notice on the debtor. In this case, the debtor had already committed an act of bankruptcy and it was therefore too late at this stage of the proceedings for him to submit that he had sufficient assets with which he could pay the judgment debt in full.

This view was followed in *Re Nyana Pandithan; Ex Parte Muniamah d/o Narayanan & 6 Ors. (supra).* In that case too the debtor, by a notice of motion applied to set aside the bankruptcy notice and the creditors' petition and one of the grounds was that the debtor was able to pay his debts and under s. 6(3) of the Act the court ought to dismiss the petition.

However, that view did not find favour with the learned judge in the instant appeal:

The learned judge said in his judgment:

> Before a bankruptcy petition can be presented, there must have been an Act of bankruptcy. That the debtor is able to pay his debts is one of the grounds provided in subsection (3) of section 6 on which the debtor may oppose the petition. The act of bankruptcy intended in the passage cited from Mat Shah bin Safuan must be the one under paragraph (i) of subsection (1) of section 3, which is failure to settle within seven days a bankruptcy notice on a final judgment for a debt. The effect of the judgment in that case is that one of the grounds provided by subsection (3) of section 6 for opposing a petition, namely that the debtor is able to pay his debt, is not available to a debtor who has committed an act of bankruptcy under paragraph (i) of subsection (1) of section 3. Such limitation is not provided for in subsection 3 of section 6, and with respect, I do not see any justification for reading, by implication, any such limitation into it or for holding that a debtor who has neglected, or failed in his efforts, to save himself from committing an act of bankruptcy under paragraph (i) of subsection (1) of section 3 is estopped in the bankruptcy petition from showing that he is able to pay his debts.

With respect, I agree with the view of the learned judge in this appeal. Two things must be distinguished:

(i) paying off the debt to avoid committing an act of bankruptcy that entitles the judgment creditor to file a creditor's petition; and

(ii) being able to pay his debt as a defence against the making of the adjudication order at the hearing of the creditor's petition.

All it means, as far as this appeal is concerned is that the relevant date to consider whether the debtor is able to pay his debt is the date of adjudication.

The Exercise Of The Discretion

So far the learned judge has been right on the points discussed earlier. The next question is, on the facts, had he exercised his discretion correctly?

As has been said by the Supreme Court in *Sama Credit & Leasing Sdn. Berhad (supra)*:

The powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion are, broadly speaking the same. See *In re a Debtor (No. 446 of 1918)* [1920] 1 KB 461 @ 465 applied in *Re a Debtor (No.12 of 1970) ex p. the Official Receiver v. The Debtor* [1971] 1 AER 504. All the relevant facts and circumstances must be considered. Where the Court of first instance has exercise its discretion, strong case would be required to authorise or induce the Appellate Court to interfere. See *In re Davidson* [1894] WN 210, *In re Carr* [1886] 35 WR 150, *Re a Debtor (No. 994 of 1935) The Debtor v. Official Receiver* [1936] 1 AER 794.

The learned judge has narrated the facts which I have reproduced on which he found, as a fact, that the respondent, as at the date of the order was made, was solvent and able to pay his debt. Considering the facts and sitting in appellate jurisdiction, I am unable to say that his finding of fact is perverse or not supported by evidence and that there is a valid reason for this court to interfere. Indeed, had the respondent appeared at the hearing of the petition, he might, on those facts, have satisfied the judge that he was able to pay his debt. His fault, as it were, was that he did not appear on the date of hearing. He said he did not know about it, as both the services of the bankruptcy notice and the creditor's petition were done by substituted service. Of course, substituted service is as good, in law, as personal service. However, the fact remains that he did not know the date of hearing of the petition, which was accepted by the learned judge. I have no reason to disagree with him on that. I also have no reason to disagree with him for the reasons given by him, that the fact that the respondent did not appear, in the circumstances on this case, does not disqualify him from applying to annul the order. But a rider must be placed. I do not say that the fact that a debtor did not appear at the date of hearing to contest the petition is not a factor that should be considered in an application for annulment. It should be considered but whether it is material or not depends on the facts of each case. However, it does not, in law estop the debtor from applying.

The learned judge gave another ground why he allowed the application based on the same fact that the respondent was solvent. The ground is that there was sufficient cause why no order ought to have been made, which is another ground in subsection (3) of s. 6. This is actually an additional ground based on the same facts, as the debtor's ability to pay his debt is already specifically provided for. I do not disagree with him and I do not think I need to say more as it also falls under the clause "ought not to have been adjudged bankrupt" in s. 105(1).

I do not think I need to discuss the other questions. To summarise I would answer the more important questions posed this way:

(a) The phrase "where in the opinion of the court a debtor ought not to have been adjudged bankrupt, …" covers not only purely technical grounds like defective service of the bankruptcy notice or the creditor's petition but also covers other legal grounds like an abuse of the process of the court.

(b) While the debtor's "ability to pay his debt" may not be a "technical ground", it is a "legal ground" which falls within the scope of the said phrase;

(c) In the circumstances of this case, the fact that the debtor did not appear at the hearing to contest the petition does not disqualify him from applying for the annulment of the adjudication order pursuant to s. 105(1) of the Act.

(d) On the facts of this case, there is no reason for this court to interfere with the findings of fact of the learned judge that the respondent was solvent and was able to pay his debt or with the exercise of his discretion.

I would dismiss the appeal with costs and order that the deposit be paid to the respondent to account of his taxed costs.

My learned brother, Steve Shim Lip Kiong, CJ (Sabah & Sarawak) and my learned sister, Siti Norma Yaakob, FCJ who have had sight of this judgment concur that for the reasons given, this appeal ought to be dismissed with costs and the deposit be paid out to the respondent to account of his taxed costs.